INAUGURAL

ADDRESSES

OF

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OUR MUNICIPAL LAW,

AND THE

BEST MODE OF ACQUIRING A KNOWLEDGE OF IT.

Gentlemen of the Law Class:

THE subject to which we invite your attention is the science of Municipal Law. This science, although special in its character, has relations to law in general, and cannot be comprehensively studied without tracing those relations or connections. Most writers upon special subjects of Jurisprudence, as, for example, Blackstone in his commentaries upon our Municipal Law, or Hooker in his "Ecclesiastical Polity of England," introduce their theme to the reader by a general disquisition upon law in the abstract—upon the divine law as revealed in the Bible, upon the law of nature and of reason—and thus deduce their own topic from the wider principle. Hooker, by a bold personification, represents all nature as actually rendering a voluntary and a glad devotion to the Supreme Lawgiver, as it yields an unswerving obedience to appointed laws. "What if," says he, "nature

should leave for a while the observation of her own laws; if the frame of that heavenly arch erected over our heads should *loosen and dissolve itself;* if celestial spheres should forget their wonted motions, and turn themselves any way, as it might happen; if the prince of the lights of Heaven, which now as a giant doth run his unwearied course, should through a languishing faintness begin to stand and to rest himself; if the moon should wander from her beaten way, the winds breathe out their last gasp, and the clouds yield no rain—if all this present joyous obedience of nature should be intermitted, what would become of man himself," &c. He then proceeds to speak of the law of reason, of the law of nations and of civil society, until he comes by easy gradations to his immediate subject.

Such a view would carry us too far from the theme immediately before us, and, while we recognize the connection thus indicated, we will at once apply ourselves to our own municipal law.

By one, the term law is briefly defined to be "a rule of action;" by another, it is said, "that which doth assign to each thing the kind of work, that which doth moderate the force and power, that which appoints the form and measure of working, we call law."*

* Hooker's Ecclesiastical Polity.

By municipal law we mean the rule that governs us in our civil conduct, under the fundamental law of the State. This is divided into common and statute law; the first rests upon general usage as its basis, and is *ascertained* by judicial decision; the other is directly originated by the Legislature.

I shall not attempt on this occasion to give a detailed account of the principles of our Municipal law. In the short hour allotted to me, I could present but a barren outline of its provisions. I shall have accomplished my purpose, if I sketch its origin, some of its vital, distinctive principles, the mode of its growth, and its present condition.

It is to be stated at the outset that Americans did not lay the foundations of American Jurisprudence. These were built by other hands. Our forefathers found the common law complete in its essential parts. They adopted it without shrewd inquiry into its origin. They even claimed it as an indefeasible right under the sacred law of descent. Whether induced to leave their homes by persecution, or allured by the persuasive voice of ambition, or charmed by the prospects of immediate wealth—whether they came with their fortunes or destitute of means—whatever else they brought with them, or whatever they abandoned, they claimed the law of England as their own; as part of their own persons; as inhering essentially

in the very notion of their property. The very term was, doubtless, dear to them. It was the *common* law. It was like the common sun that lighted them, the common air they breathed. They no more thought of criticising or questioning the legitimacy of the one than of the other. Here, without class distinctions, it sheltered the evil and the good. It had in part originated in the forest; it protected the hardy sons of our forest, expanded with their growth, and still continued to govern them as their once uncultivated wastes were organized into States and blossomed with imperial cities.

The Roman law, which is the basis of the legal codes of Continental Europe, had been termed the *civil* law. It treated the individual as an incident to the State, and regarded him in the main as a citizen. To it we owe our city corporations, and our now sacred right of local self-government. The common law, however, regards the person more strictly in his individual nature, and bears proudly on its front personal freedom, considering the State as the means for individual protection and development. The flame of liberty which we can perceive, through the vistas of history, gleaming from the morasses of the German forests, was carried to England, where it burned with a purer light. No rude blast was allowed to quench its virgin fire. The early Englishmen cov-

ered it, while it kindled, with their shields, till Magna Charta, in every line, grew ruddy with its glow.

The exact source of the common law no one can trace. It was formed at the confluence of many separate streams. Undoubtedly the Roman law contributed largely to its formation. Mr. Spence has shown this at large, and with elaborate research, in his work called "the Equitable Jurisdiction of the Court of Chancery."*

* This point is still debated among law writers. If, however, any one will examine Bracton's very early work with care, comparing it closely with parallel passages in the Institutes of Justinian, he will be greatly impressed with the fact that the arrangement of subjects, collocation of passages, and the precise language of Justinian are reproduced by the later author. He will be almost persuaded that he is reading "The Institutes." How Lord Campbell (Lives of the Ch. Justices, vol. I., p. 63) can say that Bracton uses the civil law only for *illustration*, I cannot conceive. Although he was a civilian, yet he does not write as though his statements were new, but propounds them as accepted rules. However, Cooper, in his work on "The Public Records," vol. II., p. 401, says, that there are two distinct recensions of Bracton, in *one of which* many of the passages borrowed from the civil law do not appear. "The laws of all nations are, doubtless, raised out of the ashes of the civil law," per Lord Holt, 12 Mod. R., 482.

Still, it is fair to say, that the Germans, Anglo-Saxons and the English, in succession, have, in many instances, shown a spirit of hostility to the Roman law. Florus states, that when the Roman commander, Varus, had the control of the German provinces, he endeavored to govern barbarians by the civil law, which they regarded as harsher than his arms. And while he was citing them before his tribunals, they attacked his court and destroyed his legions. Having taken one of the lawyers a prisoner, after cutting out his tongue they sewed up his mouth, crying, "Now, viper, cease to hiss"—*vipera sibilare desiste.* Book IV., cap. 12.

When the Saxons first attacked England, they, like the other barbarians, had a great aversion to towns, and suffered those who were engaged in trade to carry on their employment undisturbed. In the country, however, they appear to have seized the whole of the land, and to have driven the former owners into exile, or to have reduced them into slavery. Their complete

The Anglo-Saxons contributed invaluable results; above all, in the respect for personal freedom, and in the love of order, and perhaps in a rudimentary trial by jury. It may be that relics of the old Briton law may remain,* though Gibbon's remark is unquestionably true, "that before the irruption of the Saxons, England had been moulded into the elegant and servile form of a Roman province," while some of Rome's greatest jurists sat there in the seat of judgment With other points of resemblance between the development of England and the United States, they are strikingly alike in this respect, viz.: that each is a composite nation. In the beginning, England was a prize for the valiant; in later times, an asylum for the persecuted and the outcast. "All such have crossed the sea, and made the great island their country. Thus England has thriven on misfortunes, and grown great out of ruins." These various races who have struggled there for the mastery, or have resorted

subjugation of the natives appears from the fact, that their *laws are written in their own language.* (See *Spence's Origin of Laws.*) Every reader of English history will remember that, after the Norman conquest, the people continually demanded the restoration of the old Anglo-Saxon laws. This feeling may have been carried too far, in some respects. See Bell's Commentaries, 1, 11. "That dread of the arbitrary maxims of the civil law, which has been the distinction and the boast of England, has perhaps produced a bad effect in matters of municipal regulation, though of invaluable benefit in the formation of the constitution."

* "Questionless, the Saxons made a mixture of the British customs with their own."—*Selden's notes to Fortescue, de Laudibus legum Angliæ*, chap. 17.

thither as a refuge, have had a powerful effect on the development of the law. Like the composition of forces in mechanics, the combination of the contending powers has contributed to a resultant force in a new direction.

Thus, while we may admit that the English law incorporated into itself many of the doctrines of the civil jurisprudence of Rome, and while it may have no claim to compare with that splendid code for scientific precision, breadth and comprehensiveness of view, and while the English language may not express legal formulæ with the rigorous accuracy of the Latin tongue, yet we may with pride remember that this plain common law contained within itself that potential and vital element so lamentably deficient in the former—legal protection for individual freedom. "The political law of Rome is moulded," says one, "in its later forms in an oriental seraglio, and was fit only for a debased and servile population."

Although the early English law writer, Bracton, copied in his treatise that courtly and submissive maxim of the Roman code, "what pleases the prince has the force of law,"* it did not become an admitted

* Book 3d of Actions, chap. 9. Although Bracton admits this maxim, yet in a fine passage in the same connection he indicates the principles which ought to govern the conduct of the King. "The King ought," he says, "to exercise the power of law (which is the power of God), as if he were the vicar and minister of God on earth; the power of doing

principle in jurisprudence. This exotic could not be made to flourish upon British soil.

The true theory of trial by jury is peculiar to the common law. This mode of trial was not created by the great charter, but was secured by it. It was so well known then as to be described by mere formulary words. The freeman was not to forfeit his

wrong belongs to the Devil, and not to God. Therefore, while he acts justly, he is the vicar of the Eternal King; but, when he turns aside to do wrong, he is the minister of the Devil. Nothing is so appropriate to imperial authority as to rule according to law, and to submit to the law is greater than it is to govern. He should pay a proper respect to the law, for it is that alone which made him King. He is no King whose will rules and not law. Let him be just as well as merciful, and let his eyes so precede his footsteps that his judgment shall not vacillate from want of knowledge, or his merciful nature be deceived from want of circumspection," &c., &c. The whole section is worthy of perusal. Still he furnishes no remedy for the King's wrong acts, for he says in another place, "As, however, no writ can be directed to him, his subjects can only petition that he will correct and change his evil course, which if he will not do, it is sufficient punishment that he will hereafter meet the Lord as his judge. Let no one presume to dispute his acts, much less to oppose him."

[Although Bracton, according to Lord Coke, lived when Magna Charta was granted, yet it is not much dwelt upon or recommended by him. Barrington on Statutes, p. 1. His work was published between 1262–7.]

Fortescue, in his book "De Laudibus legum Angliæ," written in the reign of Henry VI. (1463), a book replete with noble thoughts, repudiated the civil law doctrine. In his assumed conversation with Prince Edward, he says, "Let it not trouble you, most noble prince, to know whether it is best for you to study the civil or common law, for the King of England *cannot* change or alter the laws of his nation at his pleasure. For he governeth his people by power not only royal, but also *politique*. The civil law says, what pleases the prince has the force of law. But this much differs from your power, for the people are ruled by such laws as they themselves desire. Rejoice, therefore, O Sovereign, and be glad that the law of the land is such." Old translation. He represents that many of the former kings of England were continually annoyed because they could not introduce this slavish principle into the English law. This view is confirmed by the existing formula of assent to a law passed by parliament—"le roi le veut."

life, liberty, or property, except by the judgment of his peers, and by the *law of the land.** Though the Roman law recognized the selection of a body of men to whom legal questions might be submitted, somewhat analogous to a jury, yet it did not make the grand and capital distinction which has preserved our theory so long, and has incorporated it so fully into the fundamental law of our States, that a criminal on trial cannot dispense with its full number, even if he will. The select body, in the Roman procedure, in its later development, pronounced both the law and the fact.† They ultimately needed assistants, or assessors who knew

* I am aware that some writers explain these words differently. Mr. Hallam and Mr. Reeves are of opinion that the words "law of the land" refer to trial by combat or ordeal, while Mr. Forsyth, History of Trial by Jury, pages 108–12, insists that the words "judgment of his peers" do not refer to trial by jury. His main argument rests upon the use of the word *judgment*. He urges that the verdict of the jury cannot be called a *judgment*, and believes that the words refer to trial in county and manor courts. It seems incredible that the *barons* of *England* should have made this great State paper hinge on trial in manorial courts and on the law of combat and ordeal! Technical legal rules may be pressed too far in interpreting national documents. Trial by jury was originally a trial by witnesses from the vicinage, who informed the judge of what they themselves knew. It seems probable that, while they relied mainly on their own knowledge, they also heard the statements of others. In the progress of jurisprudence, they were required to decide only on what was laid before them as evidence.

† Savigny, History of Roman Law, vol. I., ch. 4. While admitting the above proposition, in regard to the jurisprudence of the middle ages, he regards the earlier Roman practice as quite similar to our own. In this he appears to have been mistaken. The Roman judex or juryman did not render a verdict for the court to act upon, but gave the *judgment*. This is a very important distinction, for, under this rule, the functions of the juryman were in the same danger of being absorbed by the judge, as in the middle ages.

the law. These associates were usually wily and subtle men, who were conversant with the intricacies of jurisprudence. They gradually elbowed out their unlearned companions, until all the questions were decided by a body of judges who had no sympathy with the people at large. The law became more scientific, but the arbitrary maxims borrowed from the Roman codes were thus introduced into the laws of most of the nations of Continental Europe. In France, justice became not a duty, but an inheritance. The right of judicature was used as a means of personal gratification. The bar, as Stephen tell us, "formed not a *profession*, but a *caste;* a distinct noblesse, in favor of aristocratic rights, and the rights of the King. The aristocracy of the robe had no alliance with the democracy of the jury box."*

But with the great and distinctive idea of English

* Fortescue says, "that no other nation of the time could have a jury because of their condition. England had much pasture land and great numbers of cattle: in other countries men were mainly devoted to tilling the ground, which rural exercise engendereth rudeness of wit and mind." "England is so filled with landed men that a 'thorp' cannot be found so small where dwelleth not a Knight, or an Esquire, or a Franklein, or other freeholder, while there are many yeomen of substantial means to form a jury. In other countries the noblemen have small store of pasture and live far apart; so, as these cannot be assembled, the jury must be made up of poor men who are not ashamed of infamy, or are so blinded with rustic and brute rudeness as not to be able to behold the clear brightness of the truth." De Laudibus, 65, 69. His description of the England of his day is very attractive.

jurisprudence, that the Jury are to take the law from the court, it cannot disappear from our tribunals. Nor ought it to fall into disuse; for, aside from the protection furnished to the individual, its value as a means of education to the people at large cannot be overestimated. The humblest citizen is taught to think, to analyze, to compare evidence; while, if he be at all thoughtful, he cannot fail to perceive that a new dignity is conferred upon him, as he wields one of the greatest powers exercised by the Supreme Being over man—the power of judging of his acts. Although this principle has been grafted on to the law of some of the countries governed by the civil code, it has seemed to grow like a scion on an alien stock.*

So, too, the bold maxim, that "Every man's house is his castle," though evidently the product of an age when private wars were in vogue, and men defended themselves by their own arm, breathes the free spirit of the forest and the fastness. It is not the polished

* From 1791, when trial by jury was introduced into France, to 1848, the law concerning juries was changed no less than twelve times! Edinburgh Review, October, 1858. The author of the able article referred to favors the introduction into Scotland, in criminal cases, of our principle of an unanimous jury. See Forsyth, "Trial by Jury," for a full account of the European nations which have introduced the system, and the partial success which has attended its introduction. In Buckle's History of Civilization, chap. 9, are some very good remarks on the difference between individual development in England and in France, although, in pursuit of a favorite theory he does not give sufficient prominence to the Anglo-Saxon element in English character, nor to the training acquired by those who participate in jury trials.

phrase of a Cicero or Hortensius, nor can its equivalent be found in the pages of any Roman jurist. The Roman lawyer Gaius says a man's house is his *refuge.* So is the sheepfold for the lamb; but what cares the wolf for that when he enters. The common law declares that a man's house is his *fortress*, which he may defend against all assailants, even the chief magistrate himself, unless the intruder comes armed with a legal mandate in a proper case. I barely notice those delicate theories of the common and statute law, in regard to personal security and personal liberty, so delicate that the most sensitive lady could not wall herself around with a protection more complete than the law itself furnishes, as well as the theory that each individual who violates the rights of others is personally responsible, and cannot shield himself by proving the mandate of a superior officer. In these respects our law may claim a proud pre-eminence, as long as man is of more consequence than the property which he possesses.

In fine, speaking in general terms, but two systems of civil jurisprudence have challenged the attention of the world: the civil law of Rome and the common law of England. The first drew the most refined and philosophical distinctions in regard to property. The more it is studied, the more its truly symmetrical and majestic proportions strike the beholder with

astonishment. Its penal code was in many respects equitable, but in the matter of personal rights it had yielded to absolutism. It was like an accomplished gentleman, who had every grace except that he lacked independence and personal freedom. The common law, on the other hand, was in many respects rude and unphilosophical; it was, in its early forms technical to the last degree; its discussions were often puerile, and its solutions worthless, but it had in most vigorous life precisely that element which the other system lacked. It was not ashamed to borrow of the civil code many of its best provisions, for it had vigor enough to assimilate them, and incorporate them into its own growth. It was the rude man of the country, capable, by contact with civilization, of receiving the highest polish, and it was free. The one has aided to produce continental Europe, the other, England and the United States.

In the next place the English law has a history parallel with English progress. The great epochs in the history of the nation are eras in the history of constitutional and municipal law. These two are so closely connected together, that it is almost impossible to separate them. When William the Norman, in the year 1066, conquered, or, as Sir William Blackstone in more polished terms expresses it, acquired England, he with rough hand repressed the murmurs

of a discontented people, and laid upon them all the heavy burdens of the feudal system. After him England had its rulers who legalized oppression, and systematized rapine. So far had this gone, that in Stephen's reign men openly inveighed against Providence, crying aloud that "Christ and his saints were asleep."

The great progress of England has consisted in protecting the person, and in shaking off the fetters from the law of her landed property. I do not mean that she has abandoned feudal theories, for these are so entwined with the growth of the law, that to pluck them out would be to root up the law itself; but I speak of the feudal clogs on transfer, the exactions and tyrannous burdens of the system. Even her wars have been but of little consequence, except so far as they have effected legal and constitutional alterations. The sea-girt isle has always been too firmly anchored to feel sensibly any shock from without. The surface of English society has not been disturbed by exterior storms, but by internal volcanic eruptions. Their wars, when not civil, have been fought on foreign soil. Her citizens may have been allured by the visions of glory, but they have not been compelled to summon all their energies for the exercise of the sacred right of self-defense. If you ask them where are the events of interest in their

national life, they do not point to Agincourt or Blenheim, or even to Waterloo, but to Magna Charta, the Petition of Rights, the Habeas Corpus Act, and the Bill of Rights. Magna Charta itself contains provisions of a strictly legal nature—such as the one which secures a widow's right of dower with her quarantine. The members of the bar and the judges sprang from the people, and by means of the jury were always in contact with them. In fact, the bar formed one of the ties by which the middle and lower classes were bound up with the aristocracy. Many of the Chief Justices, like Lord Chief Justice Hale, had the advantage of being born in the middle ranks of life, of receiving a liberal education, and of being obliged to depend on their own exertions for distinction. Those who were descended from the aristocratic classes were almost all younger sons of younger brothers, and had their fortunes to make and their fame to achieve. They sympathized with the progress of society. When the legislature endeavored to establish entailed estates, the judges by a pious fraud defeated them; when a further attempt was made to introduce perpetuities, under the subtle doctrine of contingent uses, Lord Bacon, in his character of lawyer, suggested the general principles of that happy medium, by which estates can be locked up in families for a well-ascertained and limited period. When Charles the First

needed to be checked in the undue exercise of his prerogative, "our great master," Lord Coke, framed and carried the "petition of right" with such lawyers as Selden and Pym to advocate it. When the old writ of Habeas Corpus, which sprang out of Magna Charta, needed to be fortified and strengthened by new provisions and penalties, Shaftesbury, once Lord Chancellor, promoted it. When the House of Stuart was driven from the throne and the English constitution was to be secured for all time, the draft of the substance of the great state paper of that period made the name of the distinguished lawyer, Somers, immortal. To a prominent member of that profession, Sir S. Romilly, it was left to suggest the principles of reforms in the criminal law, while the recent great changes in the administration of the civil code have been fostered by such men as Lords Brougham, Campbell and others, although due credit should be given to the philosopher Bentham, for the suggestion of fruitful ideas. It is true, that leading lawyers have opposed many of these changes, and that others, not lawyers, have been greatly instrumental in the introduction of some or all of them. I do not deny that, in the progress of the law, individual members of the bar have been oppressive and unjust, and that bad monarchs have found among them pliant, expert and unprincipled servants. Still it is also true that,

in every crisis where a bold patriot and statesman from their body was needed, he could readily be found. In no one instance, as in France before the Revolution, have the whole profession abandoned the people.

The influence of the legal profession can also be traced in the cautious and conservative character of all the changes in the common law. From the earliest state paper down to the latest, the plan of the patriot lawyers has been, to retain, so far as practicable, the old; to add, by way of amendment, the new. In the same spirit was our own United States Constitution formed. When the old Confederation was found to be illogical in principle, and utterly inefficient in action, it was not resolved to discard it, but only to form a *more perfect* Union—to *establish* justice—to *insure* domestic tranquillity. There have been more elegantly devised schemes of government, both in this country and abroad, than either of these constitutions—logically faultless—beautiful in their mechanism—their only possible defect was, that, when an effort was made to put them in motion, they would not go. On the other hand, the English constitution, largely framed by lawyers, full of contradictions and absurd legal fictions, has been practical and effective, and in its development has made rich and free one of the greatest nations of the earth.

This historical progress of the law is important in another point of view—it greatly complicates its study. There is a large class of questions in the English law which ought to have no place in a truly philosophical system of jurisprudence. These may in general terms be called questions of *forum*—the inquiry is not what a person's rights are, but where they must be enforced. So that rights which are denied in one court are granted in another. The Roman theories of jurisprudence admitted no such view. Her law, in its full development, was as comprehensive as her empire. When she had conquered a nation, she annexed it, incorporated it, assimilated it, while important legal questions arose which could only be settled by a true philosophy.*

Although, down to the destruction of the empire, there was a distinction between cases of ordinary and extraordinary jurisdiction, analogous to our distinction between law and equity, they were both examined by the same judicial officer. Great Britain was

* "Rome, in her colonies, continually reproduced herself; every colony was but an image of the mother city, with like holy rites, like courts, like laws, temples and places of public commerce."—*Selden.* The early forms of the Roman law were very technical. As the republic expanded its limits it became necessary to liberalize her jurisprudence. Savigny gives an account of the conflict between the old jurists, who strove to preserve the fixed forms of procedure, and the judges who wished to introduce broader principles to meet the exigencies of the case. The author shows, in a truly philosophical spirit, how all law must be treated as an index of a nation's development, and that the progress of legislation is not governed by chance, but is the expression of the very life of a people.

insular and isolated. If she had gained territory, she would have governed it as a mere dependency, and would have applied to the colonists the narrow rules of the common law. She had no great legal questions with which to deal in the early periods of her history. Her courts were created by accident, or gained jurisdiction by quarreling for it, or by filching it under the guise of some subtle legal fiction. The higher clergy had the care of testaments, and of the administration of estates, and the court of admiralty of certain questions arising at sea.*

The common law courts dealt with crimes, personal actions, and questions in regard to land, while their views in some respects were so narrow that the Court of Chancery was obliged to supply the defects

* The jurisdiction of these courts is said to have been obtained by encroachment.

"The common law had cognizance in Edward First's time of things done upon the sea; however, afterwards it kept its limits within the body of the county, leaving the sea to the Admiralty." Selden's notes to Fortescue, chap. 32. He cites to the point of jurisdiction of the common law courts, a case in 25th year of Edward First's reign (fol. 82), with several other cases.

"The cognizance of wills and testaments does not belong by *common right* to the ecclesiastical courts, but to the temporal or civil jurisdiction, yet by the custom of England it pertains to the ecclesiastical judges." Hale's History of Common Law, p. 28. The jurisdiction was settled in Bracton's time. He says: "Si de testamento oriatur contentio, in *foro ecclesiastico* debet placitum terminari, quia de causa testamentariâ (sicut nec de causa matrimoniali) curia regia se non intromittit." Book 2, p. 61. It is even recognized at an earlier period by Glanville. There is reason to believe with Dwarris (on Statutes, p. 759), that the jurisdiction of the ecclesiastical courts was not strictly usurped, but grew out of positive enactments by William the Conqueror. Bentham, vol. 2, p. 179, states forcibly the complexity of English procedure.

in their administration of justice. The Court of Chancery grew out of the practice of appealing to the king's prerogative for redress in cases where the positive law was deficient. The king, being unable personally to decide the cases that sprang up, heard the cause in council or delegated the duty to his officer, the Chancellor, then always an ecclesiastic. The Chancellor, in the early history of the courts, proceeded without adherence to rule. He would direct the parties to go before arbitrators, or he would mediate between them himself; or he said to them that he would talk with some great man in regard to the case. Some of the early decrees are sufficiently singular. Thus in one case the court say, "Considering the honorable dealings of the plaintiff during her whole course of life, and of the good opinion had of her counsel, the Court thinks well of her title, notwithstanding the allegations and *proofs* to the contrary." It was emphatically a court of *good feeling*. A plaintiff had failed in his suit, and had been condemned to pay costs. The court say, "Considering that he is a poor boy, in very simple clothes, and under twelve years, the costs shall be remitted." The costs for dismissing a bill were as remarkable as any part of the case—only twenty shillings. As the Court advanced, although it disregarded form, and took for its guide general jurisprudence, and looked

for substantial justice, it became bound down to a set of rules and was governed by precedents. These must now be studied as a science, and are not to be discovered, as many suppose, by the plain, common sense of a layman.

Many have supposed that this very division of remedies among separate courts has conduced to greater precision in the law, and that different rules can be adopted therein to meet the public convenience and promote real justice. Without entering upon that question, it is only our purpose to show how much the labor of the student is increased. Nothing is more distressing to the learner in jurisprudence, in the outset, than the apparently conflicting views taken in the different Courts. In his common law books he finds it positively laid down that husband and wife are one, that they cannot sue each other—that they cannot contract together, and that all the wife's personal property belongs to the husband. Having treasured this up, he learns in his equity books, that they may be in that Court two closely contending litigants, pursuing each other with rancor, not necessarily veiled even under the forms of courtesy—that they may contract together in a proper case, and that the wife's *separate* property does *not* belong to her husband. In his common law books he learns that

a mere finder of goods upon land has no lien upon them, even if he has rescued them from injury; in the Admiralty books he learns that a finding or saving at sea, or under the jurisdiction of that Court, is "highly meritorious," and that the salvor is carefully protected in his rights—so that, if he should save a sunken or abandoned boat, with its contents, in the Hudson River, where the tide ebbs and flows, he would have a lien upon the property, which would be recognized even in the common law courts; if above tide-water, he would have no lien on the goods, even though he had used the same exertion, and perhaps would receive no compensation at all, unless the act was done with the knowledge or consent of the owners. In studying the law in regard to wills, their proof and validity, he finds that a decision of the Surrogate (who represents the Ecclesiastical Courts of England in one branch of their jurisdiction), in regard to the validity of a will of *personal* estate, if not appealed from, or reheard in a limited period, is conclusive; but that, if the will includes both real and personal estate, so far as the real estate is concerned, an appeal from the Surrogate's decision is wholly unnecessary, and that for a long series of years the question may be raised anew in the common law courts; or, if the case has been appealed from the Surrogate to the highest Court on

one branch of the property, and has been decided after the appeal, still he may bring a new suit in regard to the real estate, without any reference to the decision of the appellate Court. Thus it may happen that on the same will, and precisely the same state of facts, it may be decided that the testator is sane enough to make a will as far as his personal property is concerned; and that he is so insane that he *cannot* make the will when the real estate is considered. The only possible reason for this latter theory is the one given by Ch. Baron Yelverton, in the House of Lords,* that the cases are heard by different jurisdictions! The anomaly does not exist from the fault of the judges, for they have regarded it as an absurdity, and recommended its abolition, from Lord Hardwicke's time down to the present day.†

The importance, then, of studying the law historically cannot be too strongly inculcated. Some of the leading questions of our time have been fully illustrated only by the industry of those who have traced

* 1 Ridgeway, P. C., 277.

† 2 Atkins' R., 379. There are some early decisions on this point in Croke's Reports. In King James First's reign, an effort was made to induce the Courts of ordinary jurisdiction to *prohibit* the ecclesiastical judge from hearing the case, on the ground that his decision might influence a jury, when the cause came before them. Commissioners appointed in the time of the Commonwealth recommended the abolition of this branch of the jurisdiction of the Ecclesiastical Courts.

the whole course of legal history. For instance, the question, in what cases dispositions by will to charitable uses are valid, was thus carefully examined "in the Girard College case" by Mr. Binney, and the means furnished to the Court for a discussion of the true doctrine upon that involved and intricate subject. *Adhuc sub judice lis est.* While, then, the student is mastering the present law, he must descend through all the strata of centuries, hammer in hand, till he comes to the hard granite of the feudal system. It would in general be useless to seek to get any lower, or to chip away much of its substance. He may look and pass on. In the secondary and other formations he will find many rare things of value, not merely fit to be laid away in the cabinets of the curious, but which can be polished and fitted for immediate use.

This historical examination may in part accompany, and in part succeed, the systematic study of the present law.*

It is another prime feature of the common law

* The Roman code recognizes the necessity of an historical study of the previous law. Says Gaius, in a passage quoted: "Being about to interpret the laws, I must go back to the very origin of the city, not because I wish to make my commentaries verbose, but because I observe that I can only thus make my work symmetrical. For, if it is a shameful thing for an advocate to argue a cause before a judge, without making a preliminary statement of the facts, how much more disgraceful it is for one who pretends to interpret the law, to undertake the task without an historical examination of it, coming to the subject, as it were, with unwashed hands."

that it has not been the mere deduction of theorists, reasoning from certain admitted principles, but that it has been slowly worked out by actual experience, announced by the judges, and formed into binding precedents. The Anglo-Saxon mind cannot admit the idea that a judge may originate law. He can only *pronounce* it, and that after argument, and when the precise point is involved. Everything else is a dictum—a mere saying—a bright scintillation, perhaps, from the judicial mind, but expiring with the occasion which gave it birth. Thus, in developing the law, sharp contests have arisen over tangible facts. Judicial discussions have been animated by the fierce passions of the parties to the suit. The questions of slander have not grown out of hypothetical cases, but have been actual charges, envenomed by party rancor or personal enmity. The ejectment suits were not mere mooted questions, but arose when the true owners had been turned out of possession with the strong hand. Here, under color of judicial decision, have been great battles fought. Here have been struggles for wealth and power, and contests for the prizes of party ambition. All that talent, learning, subtle disquisition, and nice analysis could do, has been done. The lawyers have at times contended so desperately as to arouse the monarch's sceptre. Thus, the development of our law has been

a great drama of centuries—a romance in its circumstances—a drama in its action.

As a general rule, where the government was not concerned, and in later times where it was, the judges perceived the excitement without sharing in the passion, and have had a solemn consciousness that they were elaborating rules for the use of future ages. A high English authority, Chief Baron Pollock,* has recently stated, from the bench, that he whom we only know as "the infamous judge Jeffries" was no bad judge when the rights of the king were not in question. Roger North, also, in his admirable life of Lord Keeper Guilford, tells us in what round terms and with what virtuous indignation the same judge berated from the bench the magistrates of the city of Bristol, for an evil practice into which they had fallen.†

It is remarkable with what slowness—intolerable slowness it would be in our time—the early judges proceeded to a decision on an important point—how they had it argued and re-argued—through how many appeals and re-arguments on each appeal the

* 36 English Law and Equity Reports, p. 526.

† The mayor and aldermen of Bristol had become "judicial kidnappers of small rogues and vagabonds, whom they sent to America and sold." Jeffries appears to have treated these dignitaries with great severity. North, who was no friend to him, says, "that he delighted in such fair opportunities to rant." See a graphic account of the incident in North's Lives, vol. 2, p. 24–27.

case went, how long they kept it under consideration, until they, perhaps, forgot the argument, while the interests of the client were lost sight of in their anxiety not to jeopard the integrity of the law. This theory, adopted from good motives, was a mistaken one, and was shorn of its defects at the opening of the career of Lord Mansfield. A well-known and competent authority, after an examination of all the evidence, is clearly of the opinion that Shakespeare was once a clerk in a lawyer's office. As this was during the period spoken of, if he copied all the papers, and waited on the arguments, he had good reason to know what was meant by "the law's delay."*

The great father of modern philosophy, profoundly versed in our jurisprudence, though disliking professional practice, adhered closely to precedent, directing Justice Hatton, when he was made Judge, to draw his learning out of his books, and not out of his brain It would be interesting to trace how Lord Bacon's legal studies acted on his philosophical speculations, and how much his caution, in reaching conclusions in philosophy, depended on the care which he used in

* This delay is not peculiar to English jurisprudence. (See *Fortescue de Laudibus*, 127.) He says: "While I was lately abiding in Paris, mine host showed me his process in writing, which, in the Court of Parliament, he has followed eight years, to recover eight pence sterling, and he was in no hope to obtain judgment in eight years more. I also knew other cases like unto these."—*Old Translation.*

sifting evidence, and in weighing conclusions at the bar.

By this process the municipal law of England has gained a steady and a fixed character. The principle, having been settled after the most exhaustive discussion, and the most careful examination, assumes the binding force of a precedent. Judges have sometimes struggled in a mental conflict between precedent and principle. Lord Mansfield used to say that he ought to be drawn placed between the two, like Garrick between Tragedy and Comedy. And yet this very Judge, in a great case, in which there was a difference of opinion on the bench, says, "This is the first instance of a final difference since I have been here —thirteen years. That unanimity could never have happened if we did not communicate our sentiments with great freedom; if we did not form our judgments without prepossessions; if we were not open to conviction, and ready to yield to each other's reasons." Although it is usual to account for this unanimity by stating that the master intellect of Lord Mansfield overshadowed the other judges, yet, when we consider their ability* and this declaration, it is fair to presume otherwise.

How different is this from the condition of parts of the Roman law. A distinguished jurist of our

* 2 Campbell's Ch. Justices, p. 395.

own country, Judge Story, has collected the opinions of the leading civilians on the subject of the conflict of laws. The wide and comprehensive research of the author has only displayed its uselessness, for, from the discordant views of the writers cited, scarcely any intelligible principle can be extracted. Instead of presenting us the conflict of laws, our ears are stunned by the conflict of opinions. Of course, large portions of that law are definite and certain, but the fact that, since its codification by Justinian, its progress as a system has been largely due to text writers, reasoning without an actual case discussed before them, while the progress of the common law has been mainly due to judicial decision, based on actual cases and discussions, forms a marked difference in the two theories of jurisprudence. Countries governed by the civil law have felt the difficulty of this theory. Spain resolved, in 1713, that it was a great inconvenience that her tribunals had followed foreign jurists and authors, to the depreciation of her own, and forbade the quoting of foreign opinions in antagonism to the views of Spanish jurists. What was this but establishing in an indirect way the rule of following precedents.*

* See 17 Martin, Louisiana Rep., 583. As to the similar condition of the Roman law before the Justinian Code, see Savigny's History of Roman Jurisprudence, vol. 1, page 8. He says: "The great Roman jurists entertained, on many subjects, very different opinions, and who possessed the power of reconciling these differences *by a judgment of higher authority?* The decision

When law is developed in the English mode, it is not theoretical—an object of speculation or criticism; it is practical, and becomes at once a rule of action. It will be generated slowly as cases arise, and may be submitted to the tests of experience. If it appears that a wrong step is taken, it can be retraced, and the mischief corrected before the vice has permeated the entire system. It is known that Lord Mansfield almost created our commercial law, and the law of insurance. It is a sagacious remark of Lord Campbell's, that when the former had to grapple with the great questions that came before him, instead of proceeding by legislation, and attempting to codify, he wisely thought it more according to the genius of English institutions to introduce improvements, gradually, by way of judicial decision, while, he not only settled the particular case, but established with precision, and on sound principles, a rule to be afterwards quoted and recognized as governing similar cases.

of lawsuits must have been exceedingly difficult, or unsteady and arbitrary. The Emperor Valentinian regulated the matter in the West by an imperial decree; the principle was afterwards adopted in the East by the Theodosian Code. By the rule then adopted, no treatises were to be cited except those of five jurists, who were named, viz.: Ulpian, Papinian, Paulus, Caius and Modestinus." A code is almost a necessary refuge where law is developed by mere thinkers; the idea of an *authoritative* exposition of principles must be carried out either by judicial decision or by legislation. The present very loose practice of reporting cases, both in this country and in England, threatens to introduce into the expositions of the common law the same vice of *uncertainty*. If reporting is not regulated by legislation, we shall be driven to a code.

Doubtless, the judges have sometimes assumed the duty of the legislator, but even then judge-made law is better than text law. In this manner the common law has been accommodated to the advancing spirit of each age. This has been especially true in the law of personal property, contracts and commercial law. The spirit of the old scholastic philosophy had so pervaded the law of real estate that few organic changes could be made. The law of fixtures, however, is an instance of a modification made to meet the changing circumstances of the times, while a court of equity, "that rib," as Bentham says, "taken out of the side of the law in the dark ages," the younger, and in some respects the comelier sister, has so treated it, in the law of partnership and otherwise, as to meet the exigencies of an advancing trade and commerce.

If any new product or invention is introduced, the common law establishes rules in analogy to similar cases.* Thus, it attaches itself to the railroad, and soon there are worked out bulky volumes on the common law in regard to railroads. It applies itself to the electric telegraph, and adds that subtle and incorporeal agent, electricity, the very Ariel of

* This theory is as old as the law itself. Says Bracton, "If any new and unusual case arises, such an one as has not before arisen in the Kingdom, let it be adjudged according to analogous cases, if any exist, for it is good to proceed a similibus ad similia." Chap. 2.

jurisprudence, to the list of common carriers, laying down the rules for its guidance in the transmission of messages.* In this manner the law is everywhere present, either active, or, if dormant, ready to spring into life when the occasion arises.

Side by side with the study of the history and principles of law, you are also to examine legislation and its history. The statute-making power has been, in modern times, continually on the alert, changing the rules of the common law, and adopting new provisions to meet the altered conditions of society. It will be necessary to examine the principles that guide the courts in the interpretation and construction of statutes, especially in case of their conflict with the fundamental law of the State or of the United States. Legislation has a history which has also to be studied, for one statute cannot be understood without the examination of others on the same subject, and sometimes not without a more or less minute examination of the general history of legislation. The knowledge of this enacted law grows in importance every year.

In our own State, we have made great changes in the common law, especially regarding real estate, while, as every person knows, we have abolished the old forms of procedure. It may be remarked in

* 33 English Law and Equity Reports, p. 180.

passing, that by a singular coincidence we have gone through with the same process, in respect to pleadings, as the Romans. They had technical forms of actions; so had we. They had actions, analogous to our chancery suits. They consolidated the two, and proceeded without form. This we have done. In proceeding without form, they found, after a long experience, that it was necessary to pass a rule which we have not yet adopted. The Justinian code required that a case should not be in court more than three years. The reason given was, that suits were likely to outlast the life of man, and to become immortal. We may yet find it necessary to complete the parallel, by adopting a similar provision.

By constitutional provisions from the beginning, such parts of the common law and amendatory statutes as were in use during our colonial period, down to April, 1775, were adopted as the law of this State. Taking, as we did, an entire system of law from another country, it is surprising that it could be so readily adapted to our institutions. Whatever we found unsuited to our condition, we rejected, either by judicial decision or by legislation. Thus we discarded the English theory of the descent of land to the eldest son. So the theory of ancient lights or windows, if it ever had any solid foundation in the law, to the extent to which it

was carried, was rejected or modified, so as to suit our circumstances. So we dealt with the ecclesiastical law, in regard to the effect of future promises to marry, and with some of the rules of law in regard to the dead. A branch of the latter doctrine has been recently shown, with elaborate research, to rest on false theories, fanciful etymologies, and in its details to be wholly alien to our most cherished sentiments, and was pronounced no part of our law.*

How readily will this conclusion be acquiesced in, when we learn that, in this last year, it was decided in the high Court of Criminal Appeal, in England,† that a son might, by the common law, be indicted and convicted of a misdemeanor, who openly, and in the light of day, removed from a dissenting burial-ground the remains of his own father, although he was prompted by the most filial sentiments, and although he had reason to believe that the trustees of the cemetery were about to devote the ground to secular purposes. The son had not asked the permission of the trustees. The judge, who pronounced the opinion, said, "the common law recognizes no property in the remains of the dead." He then gave a singular reason for his decision, stating that if the conviction were not sustained, there would be no mode of

* See Report of Hon. S. B. Ruggles, 4 Bradford's Surrogate's Reports, 503.
† 40 E. L. E., 581, Regina *vs.* Sharp.

protecting the remains of deceased persons, interred in the burial-grounds of dissenters. As if the best way to protect them was not to decide that the son *had* a property in the remains of a deceased parent. Be it said, to the honor of the Bench, that they exercised a humane discretion in inflicting only a nominal fine. Doctrines like these we ought to reject at once, without waiting for legislative action. They are the result of circumstances peculiar to English history, and ought to be regarded as no part of our law. It is evident, too, to any one, who watches the development of the law of the two nations, and the course of legislation, that their jurisprudence diverges from the common point more widely every year.

The common law is to be learned in a great variety of reports, and in some authoritative treatises. Among the good cases will be found many that are mistaken and worthless. They were either badly argued or miserably reported, or the "Judge mistook rapidity for the due administration of justice, and made decrees which ought to serve not as examples to be imitated, but as land-marks to be avoided by all future judges." Many of these cases have been explained, limited, criticised, or overruled in other decisions. They are declared counterfeit coin; but the inexperienced eye is in great danger of receiving them as genuine. Other cases have their authority dimin-

ished, because a bare majority of the judges concurred in the decision, although, as it has been happily expressed by Justice Coleridge, late of the Queen's Bench, English judges, as a whole, "have had so much of general agreement as served to give authority to their judgments, with so much occasional difference as served to show their individual responsibility and independence." This crowd of volumes urges upon us a systematic study of the law. One must be guided by the principle rather than by the case. Even abolished law must be studied carefully, both because it governs all acts done while it was in force, and because it is often explanatory of what is introduced in its place. After Chancellor Kent had given in his commentaries an extended discussion of a legal rule known among lawyers as "the rule in Shelley's case," he appended a note to his text, in which he spoke in eloquent language of the fact that this rule was abolished by our Revised Statutes, and remarked that, so far as this State is concerned, all he had written is but a monument to the memory of departed learning. Yet, since that note was written, scores of cases have occurred in our courts, in which the abolished rule was examined, with its qualifications and limitations. Every real estate lawyer meets it, from time to time, in deducing a chain of title to land. The fact that it exists in full force in other States makes it necessary

to know it. Changes in the law only complicate the lawyer's studies. He must be alike familiar with the old rule and the new. Janus-faced, he must look both forward and backward. Notwithstanding the vital alterations that have been made in the law of husband and wife, and the more comprehensive changes that are threatened, no competent lawyer supposes that a full knowledge of the old rules will not be necessary at least during this generation.

Thus, in free countries, like England and the United States, the studies of the ripest jurist are never at an end; rather, just beginning. A great German poet, if he had lived here, would not have made one of his well-known characters say that legal rights are transmitted from grandsire to grandson, like an hereditary disease.* They seem, sometimes, more like the fabrics of which the English poet speaks, "they rise like an exhalation."

We will be asked if all this complexity of laws be necessary? We reply, so long as the variety of human events is so great; while men seek wealth with energy, and compass sea and land to obtain it; while pride and vanity influence testators; while trust and confidence are reposed by man in his

* "Es erben sich Gesetz und Rechte
Wie eine ew'ge Krankheit fort
Sie schleppen von Geschlecht sich zum Geschlechte
Und rücken sacht von Ort zu Ort."—GOETHE'S FAUST.

fellow; while fraud assumes its Protean shapes; while the family exists, and absolute rights are regarded, so long will jurisprudence be obliged to adapt itself to these important facts in all their details. The complexity and intricacy of legal principles, I do not say of legal forms, is the price we pay for our free, advancing and refined state of society—an intricacy only to grow more intricate, and a complexity to grow more complicated. Yet it is safe to say that he, who is thoroughly familiar with the fundamental principles of law, has the thread in his hand by which he can be guided through the labyrinth. The science of pure mathematics has its settled and determined principles, which can be mastered by patience and application; when these principles are applied to celestial mechanism and the perturbations of the planets, the problems which grow up need the intellect of a La Place and a Plana to compass them. The principles are few; the objects to which they can be applied are almost infinite. Yet, through all these complicated movements and action and reaction of matter, the master mind goes with certainty, sounding the abysses with his well-known principles, and carrying the torch of exploration steadily before him. The mechanism of the heavens is none the less scientific, because it is difficult in some cases to apply right principles in the examination of its intricacies.

Yet how many regard jurisprudence, with the same difficulties to contend with, as having little claim to a scientific character! Goethe opens his great tragedy of Faust by introducing the future arch-magician in a rhapsody on the worthlessness of law and the sister sciences. He says:

"I've now, alas! Philosophy,
Medicine and Jurisprudence too,
And, to my cost, Theology,
With ardent labor studied through.
And here I stand, with all my lore,
Poor fool! no wiser than before;
Master, ay, Doctor, styled indeed,
Already these ten years I lead
Up, down, across, and to and fro,
My pupils by the nose, and learn
That we, in truth, can nothing know." *

After more to the same purpose, and a determination to look into the very essence of things, and no more to busy himself with words, he abandons these sciences in despair, betakes himself to magic and kindred subjects, and ends, as was natural, in a close and altogether disagreeable intimacy with Mephistopheles.

There is a floating opinion somewhat similar to this in the minds of many, the more difficult to meet, because undefined, that the science of law is no science, but that it is mere hap-hazard and chance. If this be so, it is not due to the subject itself, but to the way in which it is administered. No science

* Swanwick's Translation.

known among men is more strictly deductive than the science of a true Jurisprudence. If the conclusions arrived at be uncertain and unreliable, it is due to the bar who argue, or to the Judiciary who decide, the cases as they arise. If the charge be true against them, it only shows the necessity of a more thorough apprehension of legal principles. If the bar be ignorant, no amount of learning on the part of the Judiciary will save the science from the infusion of false principles; if the bar be highly educated and accomplished, they will, in a measure, elevate even an incompetent Judiciary. The argument only goes to show that, unless juries are honest and intelligent, judges thoroughly trained in their profession, and lawyers honorable, studious and learned, the conditions necessary to a scientific deduction from legal principles will not be found to exist.

It has been the good fortune of the English law that at no time, in its more modern history, have there been wanting great minds to aid in its development. *

* In the early history of England we find it said that foolish and unlearned persons ascended the seat of judgment before they had learned law. The old writer before quoted utters a solemn note of warning to this class of judges: "Let no silly and unlearned person dare to ascend the seat of judgment, which is like the throne of God, lest he shall put light for darkness and darkness for light; lest, with untaught hand, after the manner of a madman, he strike the innocent with the sword, and free the guilty, and lest he fall from his lofty seat as from the height of heaven, like one who began to fly before his wings were fledged; and let every judge beware how, in making a per-

We can almost trace the illustrious line, from father to son; the predecessor training, at all events, exercising a powerful influence over, his successors. Thus we see the chief justices mounting through every grade of their profession, to the attorney-generalship, and thence to the high seat of justice, which they do not abandon, except through infirmity or with their lives. Thoroughly familiar with every phase of legal practice, they bring all the multiform experience of the bar to a symmetrical result upon the bench. Having, previous to their elevation, practiced before men of the highest judicial cultivation, they became insensibly moulded after their pattern, so as to present a general likeness. "*Facies non omnibus una, nec diversa tamen.*" Said Lord Mansfield: "If I have had any success, it is owing to the great mind who presided in our highest court of judicature, the whole time I attended at the bar. It was impossible to attend him, to sit under him every day, without catching some beams of his light." In later days there has been a series of thorough jurists on the bench, so that even the side judges have been sometimes men of the most distinguished ability, as, for instance, Baron Parke, who has shed such a lustre

verse and illegal judgment, obtained from him by entreaty or money, he may prepare for himself, instead of a slight temporal advantage, the sadness of an eternal mourning." Bracton, book 1, chap. 2. It is very noteworthy how closely this writer connects, in a variety of passages, human law with the "law eternal."

upon the Court of Exchequer in our time, and whose name must be known to posterity as one of the ablest jurists of the age. To how many of these could Justice Buller's remark be applied—"that principles were explained and enlarged upon, until men were lost in amazement at the strength and the stretch of the human understanding?" In our own country, similar names can be mentioned of the illustrious dead, and of the no less illustrious living. Among the latter, without referring to any of our own citizens, I may be pardoned in alluding to an eminent judge, full of years and honors, who has achieved for the Supreme Judicial Court of Massachusetts what Baron Parke has accomplished for the Court of Exchequer in the mother country. Standing here, how could I forget one who once occupied the chair of jurisprudence in this venerable institution? It is not the least of its glories, to have numbered one of the principal authors of the Federalist among its students, and a great commentator on American law among its lecturers.

It is an interesting fact that in the development of this science, no jealousy or narrow-mindedness has been displayed by its expositors. The leading cases in our reports are cited in England with all the respect due to them, and not unfrequently influence the decision. The English Court of Ex-

chequer recently abandoned a position previously taken by their own authorities, from a conviction of the unanswerable argument of one of our New York judges. Our own courts are quite in the habit of following recent English decisions in point, sometimes even without entire confidence in their soundness. This part of our subject may be fitly closed by the words of Hooker—"It is easier a great deal for men to be taught by law what they ought to do, than instructed how to judge as they should do of law; for the wisest are ready to acknowledge that soundly to judge of law is the weightiest thing a man can take upon him."

May we not hope that out of these various materials a code may arise, framed by profound lawyers, and submitted for suggestion and approval not to a despotic emperor, but to the best legal thinkers of an enlightened people; a code whose authors shall not assume to *originate* law, but are willing to perform the office of aggregation, selection and systematic arrangement, and who from the vast material will drop the overruled cases and will settle those that conflict; a code which shall include our personal rights, our domestic obligations, our rights of property, and, above all, those delicate rules of the criminal law, framed for the double purpose of protecting society and of preserving the rights of the prisoner; a code

which, while no valuable line of the rugged common law is softened, and not a jot of its independence abated, is adorned with the jewels of the Roman law, and contains within itself all the best legal experience of the ages; a code which shall show the progress of judicial thought by a comprehensive sketch of the legal history of England and America, drawn by a master-hand. Thus, when the gold, the silver, the wood and the iron are gathered together, and the rubbish is burned, a fair and symmetrical temple may arise where Themis herself may sit and preside unseen, realizing in some measure the character given her by the ancients—the true daughter of heaven and earth.

But law is not to be understood merely as a *science*. It is also to be practiced as an *art*. The process of presenting a case to the judge and jury is very different from that of apprehending it when engaged in its study. You were then to be convinced yourself. You are now to convince others. You are to act the part of an expositor, of a teacher, with much suspicion as to the honesty of your motives. As far as you confine yourself to the truth, you combine those two points which are regarded in all other sciences as so difficult of combination—the character of an original thinker and investigator with that of an expositor. This exposition must often be

made with all the clearness of expression and finish of rhetoric of which you are master; with coolness of judgment and versatility of action. You may have an antagonist sophistical in reasoning, ingenious in technicalities, and unscrupulous in the use of his advantages. You may have a judge prejudiced against you or your case, irritable in temper, discourteous in interruption, or impatient of argument. You may meet a jury incapable of appreciating your fine-spun reasoning, or even tampered with by the opposite party. The case which you had constructed, as you thought, so admirably, while in the seclusion of your office, falls to pieces under the batteries of your antagonist, or is blown away, like gossamer, and remorselessly by the judge. The cases on which you rested are overruled or doubted; they were decided in another State, and are not necessarily followed; or the law is good, but the judge thinks that they do not apply to the matter in hand; or the evidence on which you depended does not support your view of the cause. If the decision is rendered in your favor, you win it in the face of the most determined opposition. In the close hand-to-hand struggle at the bar you must have real muscle, flexibility of motion, and an unyielding will. You must anticipate sophisms, and kill them in the germ, and before they have time to grow. As was the test applied to the old knights

in the days of chivalry, you can only prove your fitness for the work by parrying, though in the dark, all attacks, and meeting all surprises, from whatever quarter they may arise.

How shall such a profession, requiring for its successful practice such different qualities and training, be acquired? The full answer to this question is not altogether easy, and different minds may answer it in different modes. In general, this may be said, that, for the student, the acquisition of the principles of a science may safely precede its practice as an art. In the haste of office business, in the varied labors imposed upon a lawyer in full practice, in one of our large commercial cities, but little leisure will be found for the instruction of students. The carefully-drawn paper, which they are left to copy, is not understood. The work is done mechanically, and perhaps without more reflection than the press gives, which, in the opposite corner of the office, copies the letter unerringly for the employer. Let the student have gone over the principles of the science carefully and understandingly, with a full explanation of technical terms, and all the assistance and stimulus which a competent instructor can give, that, which before was dull and undesired, is then clothed with life and interest. On the other hand, the practice of gaining the whole of one's knowledge through the medium of

copying and the details of office business, seems to invert the usual order of instruction used in the other sciences, and to place that first which ought to be placed last. Although some may have the power, from natural capacity, to rise to success through these difficulties, thousands drop by the way like untimely fruit, or lead only a sickly and a worthless life. It is certainly no argument in favor of a consumptive climate, that, though thousands may die, a few have lungs hardy enough to resist the malign influences of the atmosphere. The unhealthiness of any regimen is to be tested by the majority who die, and not by the minority who live.

This system seems to have been borrowed from England. Note what the poet Cowper says of it there. He was placed in an eminent solicitor's office, where by a legal fiction he was supposed to learn how actions were commenced and conducted, with the practice in law and equity. He says that he slept three years in the solicitor's house, but lived in the daytime in the society of the ladies, while he and a fellow student were employed in giggling and making others giggle instead of studying law. The legal knowledge thus gained is acquired by the process of insensible absorption. It is not unsafe to say that there are still in our country, though perhaps not in so busy a city as this, modes of studying law quite

analogous. Some young men in England, of high purposes, in the last and one or two previous generations, perceiving the futility of this scheme, submitted themselves to the voluntary discipline of a special pleader's office, where, for a very large yearly fee, they received instruction. The well-known Mr. Tidd had four of his pupils sitting at one time in the House of Lords, as *Law Lords:* Lord Lyndhurst, Lord Denman, Lord Cottenham and Lord Campbell. The latter says: "To the unspeakable advantage of having been three years his pupil, I ascribe chiefly my success at the bar." Such coincidences as the above cannot be fortuitous.*

* A historical account of the modes of legal education adopted in England, and under the Roman law, may not prove uninteresting. The later Roman Emperors required a study of the law for five years, commencing with the Institutes of Justinian, while certain other portions of the code were assigned to be studied during each year. There were well-known law schools established at Rome, Constantinople and Berytus; the one at Berytus was particularly famous for several centuries. The Emperor required a yearly account of the behavior and progress of the law students, in order that he might know what persons to employ in his service. It cannot be supposed, however, that all the lawyers in the Roman empire were educated in these law schools. They may have been especially established, for the training of those who were needed in public employments. Salaries, in some instances, were paid from the imperial treasury. During the middle ages, with a single exception, the study of the law was closely connected with its practice. If jurisprudence was studied at the seminaries, it was as a branch of general education. No separate schools existed. The exception was the school at Ravenna, in Italy, in the eleventh century, which was probably removed thither from Rome, and was afterwards transferred to Bologna, where it became famous. Thus we have strong reason to believe, that the Roman School of the empire has exerted, by this removal, a marked influence over the legal education of modern times. The university at Bologna deserves special notice. It was originally a simple unincorporated law school, which, by the excellence of its

It is safe to say that the mass of young men, who engage in the study of law, commence their work with minds undisciplined to the nice distinctions and analysis required for its perfect mastery. It

instructions, attracted crowds of scholars. The Emperor Frederick I., in 1158, granted peculiar privileges to foreign students, and, among others, the right to be tried in civil and criminal matters by their professors, or by the bishop of the province. This rule was copied from the enactment of Justinian, governing the law school at Berytus. At this time the scholars elected their own professors. Afterwards, students in the department of theology and medicine came thither, and the institution assumed the form of an university, with a rector. The law professors were of two classes: ordinary and extraordinary. The former read lectures upon certain authoritative books, at which all the students were expected to be present; the latter class lectured upon other treatises, and attendance is supposed to have been optional. Besides the formal lectures, there were full expositions of particular texts in the law, and questions were discussed, which had been previously announced to the disputants. As the school at Ravenna, at least, was in operation at the time of the Norman conquest, and was transferred to Bologna not long after, it is altogether probable that the ecclesiastics introduced into England, with the Roman Jurisprudence, this mode of studying law. The legal profession apparently had an ecclesiastical origin. (See Pearce's Inns of Court, p. 14.)

The common law of England, however, as far back as the middle of the thirteenth century, was studied in the Inns of Court, in a quiet retreat, between the City of London and Westminster. These Inns of Court were four in number, with preparatory schools called Inns of Chancery. These bodies well illustrate the character of the early Englishmen. They were voluntary associations, and unincorporated. They granted degrees in Municipal Law, and the barrister went to the bar without any authority except that granted by the heads of the Inn to which he belonged; the Judges had a private visitatórial power over the authorities in each Inn, probably because they were the chief men in the law, but they could not require the society to add any person to their number unless they saw fit, while no one could become a barrister in any other way than by belonging to one of these Inns, not even by letters patent. These four Inns stood on an equality, so as to form a kind of university. The Inns of Chancery, as has been mentioned, were preparatory schools, in which were taught the grounds and principles of law. Such men as Coke and Holt delivered lectures, while "mootings" and vlva voce exercises occupied the students and prepared them for practice. Fortescue gives a pleasing account of these schools in his time.

is also a growing complaint that the younger members of the profession are untrained in its principles, that they make the law a trade, a mere mechanical employment; that instead of being artists

He says that "the students resorted thither in great numbers, to be taught as in common schools. Here was a school of commendable qualities. Here they learn to sing and to exercise themselves in all kinds of harmony. On the working days they study law, on the holy days Scripture, and their demeanor is like the behavior of such as are coupled together in perfect amity. There is no place where are found so many students past childhood as here." The labor of preparing lectures grew irksome after a time: the readers of lectures, on their appointments, were expected to give costly entertainments to the students, and the lectures, as a consequence, ceased to be read. Every advancement in the degrees of the students themselves "was attended with a position at the cupboard (a very desirable station), or with a garnish of wine."

Some curious details are given, by the authors cited below, of the masquerades and revelings at these Inns. In time, the requisitions for the preliminary admission became merely nominal. The students were examined in the classics, not to see whether they were scholars, but "to ascertain how they had spent their time before coming to the Inn, and whether they had the manners of gentlemen." The requisites for admission to practice, after becoming a student, mainly consisted in having eaten a certain number of dinners, in each year, for a fixed number of years, in the common hall. Latterly there has been a disposition to revive some part of the old plan of instruction. The present course is, to give lectures in the Inns, while those students, who wish to obtain position at the bar, employ a special pleader to teach them, in addition, and they also attend the discussions in the moot courts. The Lord Chancellor of Ireland, in a paper read before the Society for the Advancement of Social Science, reported in the *London Jurist*, of October 22d, 1858, after strongly insisting on the necessity of a more thorough classical and legal training among the members of the bar, predicts that the Inns of Court will soon adopt some effectual plan for increasing the attainments of law students. On the Continent, law schools arose in the fourteenth century, being formed on the plan of the Bolognese School. In Germany, for instance, all who are intrusted with legal business must receive their instruction under regular law professors. For full details of the school at Bologna, see "Savigny's Geschichte des Römischen Rechts," vol. 1, chap. 6; vol. 3d, pages 152, 272, and for English system, see "Pearce's Inns of Court," "Herbert's do.," "Duhigg's King's Inns, "Fortescue de Laudibus," &c., &c., &c.

in their profession, they are content with being artisans. Perhaps we may yet have to carry out Lord Bacon's suggestion, that there should be a civil reprehension from the Bench of those advocates who bring to the case slight information, or are guilty of gross neglect, or who undertake an overbold defense. It is consolatory, however, to know that this class of men is not new to the profession, and that we are not so greatly degenerating. When old Lord Chancellor Hatton, some centuries ago, was addressing the bar on one occasion, he said: "I find that there are at the bar many unmeet young men, very raw and young men, negligent and careless, which truly, in my opinion, is a great sin and fault that we should commit our rights of goods and persons to such men."

It is unnecessary to say one word as to the evil inflicted upon the community by an ignorant bar. But it ought to be said that the leading members of the profession are themselves partly responsible for its existence. The standard of admission to practice has been placed too low. If, however, the recent rule of the Supreme Court is fully carried into effect, introduced, as I personally know, from the most praiseworthy motives, by one of the judges who longs for higher attainments among law students, and seconded, as it appears to have been, with earnest

ness by his brethren, much will be achieved. It introduces a new feature into many of our examinations, in that the student must be examined upon legal principles, and not merely upon practice.

It is at this point that law schools find their justification and found their claim to support. In my judgment, they ought, in this country, when fully organized, to combine both the gymnasium and the university. They should train the student and teach him how to study, and after the work is done, or while it is being done, communicate information on special topics by full courses of lectures. The period of study should be long enough to accomplish both results. The instruction should mainly be scientific; so far as it can at the same time be practical, it must be. While, on the one hand, a law school should not be a mere school of practice, on the other hand, it should not prepare its students to be mere lovers of the science of law. They should be lawyers, or, at least, their studies so shaped as not to give them a distaste for the practical side of the profession. It is our belief, then, that a mere system of lectures, which might, in a foreign country, be sufficient for a listener who had previously passed through a course of thorough preliminary study, is not applicable in a country where there is no path to the profession prescribed by law or public opinion, and where any adult

male citizen, without such training, may claim its honors or degrade it by his unworthiness.*

We would not close this subject without stating our view, that at the foundation of all our law lies the doctrine of a true morality. The law, itself, is beneath all our constitutions, and without it no constitution is possible—at least, this law that the minority yield to the majority, with another equally important, that the majority hold their power only in trust for the general good. "Underneath our municipal law," says an old author, "is the law eternal, which ought to be always before our eyes, as being of principal force and moment to breed in human minds a dutiful estimation of all laws, because there can be no doubt that laws apparently good are copied out of the very tables of that high and everlasting law, not as if men did behold those tables, and accordingly frame those laws, but because it worketh in them, because it unfolds itself by them when the laws which they make are righteous." We are not exempted, as

* Since the above was written, I have been gratified to meet with the following passage in a work on the study of the Roman law, by Prof. Veyrieres, law professor in Paris—he says: "In studying the civil law, it is necessary to present to the pupil its history, in order to show the connection of the different rules. It is also necessary to give exact definitions, whose precision shall be equal to their clearness—without the aid of good definitions, logical divisions, and recapitulations, succinct but accurate, which are as it were a species of definitions, and superior to them, the lectures of the professor (*I speak from experience*) are but idle words thrown out to the wind, while nothing, or next to nothing, is retained by the hearers."

advocates, either, from the ethical rules which bind other men. On this point it is to be feared that the average public sentiment in the profession is too low. Men must not draw a nice distinction between *private* honor and *professional* honor. The one is as truly delicate as the other. Nor do we or the community feel sufficiently the close connection between the high character of the legal profession and the well-being of the State. The fact, that the laws are complete, is of no consequence, unless we have true men to administer them. The best laws, like machinery, are capable of having their power perverted. Law itself is inert; a mere abstract statement; as abstract as a mathematical proposition. It is but the major premiss of a syllogism. It is the advocate and judge who give it vitality and power. Both are ministers of justice. Each holds a high trust, to do no act which shall disturb the well-being of the Commonwealth. History and experience, alike, teach us that lawyers without principle may do unlimited harm. There have been those to whom Sallust's remark applied, that it was a great reward to them if they could only disturb those things which were previously quiet.*

*The Roman jurist Ulpian had a high idea of the true dignity of his profession. He says: "We are properly called priests—we worship justice, profess the knowledge of good and evil, separating the just from the unjust, discerning the lawful from the unlawful, and, unless I am mistaken, desire a true and not a false philosophy."

Gentlemen of the Law Class, we invite you, then, to a course of study and of diligent labor. This science cannot be learned without study. We hope, however, to smooth the pathway to the subject, and to lighten, somewhat, the labors of the ascent. You may not reach the meaning of the principle at once. Be not discouraged, for, on a second perusal, or at some other time, it will become clear.

We would hope, in the language of Lord Coke, "that we may open some windows of the law, to let in more light to the student, by diligent search to see the secrets of the law, or to move him to doubt, and to enable him to inquire and to learn of the sages what the law, together with the true reason thereof, is, knowing, for certainty, that the law is unknown to him that knoweth not the reason thereof" —while we would extend to you, as a greeting, what he uttered as a farewell: "We wish unto you the gladsome light of jurisprudence, the loveliness of temperance, the stability of fortitude, and the solidity of justice."

AN APOLOGY

FOR THE

STUDY OF ENGLISH,

DELIVERED

BY GEORGE P. MARSH,

ON

MONDAY, NOVEMBER 1, 1858,

INTRODUCTORY TO A SERIES OF LECTURES IN THE POST-GRADUATE COURSE OF

COLUMBIA COLLEGE, NEW YORK.

ADDRESS.

THE severe Roman bestowed upon the language of his native land the appellation of *patrius sermo*, the paternal speech; but we, deriving from the domesticity of Saxon life a truer and tenderer appreciation of the best and purest source of linguistic instruction, more happily name our home-born English the mother tongue. The tones of the native language are the medium through which the affections and the intellect are first addressed, and they are to the heart and the head of infancy what the nutriment drawn from the maternal breast is to the physical frame. "Speech," in the words of Heyse, "is the earliest organic act of free self-consciousness, and the sense of our personality is first developed in the exercise of the faculty of speech." Without entering upon the speculations of the Nominalists and the Realists, we must admit that, in that process of ratiocination properly called *thought*, the mind acts only by words. "*Cogito, ergo sum*, I think, therefore I am," said Descartes. Whether this is a logical conclusion or not, we habitually, if not necessarily, connect words, thought, and self-recognizing existence, as conditions each of both the others, and hence it is that we

have little or no recollection of that portion of our life which preceded our acquaintance with language. Indeed, so necessary are words to thought, to reflection, to the memory of former states of self-conscious being, that though the intelligence of persons born without the sense of hearing sometimes receives, through the medium of manual signs, and without instruction in words, a very considerable degree of apparent culture, yet, when deaf mutes are educated and taught the use of verbal language, they are generally almost wholly unable to recall their mental status at earlier periods; and, so far as we are able to judge, they appear to have been devoid of those conceptions which we acquire, or, at least, retain and express, by means of general terms. So our recollection of moments of intense pain or pleasure, moral or physical, is dim and undefined. Grief too big for words, joy which finds no articulate voice for utterance, sensations too acute for description, when once their cause is removed, or when time has abated their keenness, leave traces deep indeed in tone, but too shadowy in outline to be capable of distinct reproduction; for that alone which is precisely formulated can be clearly remembered.

Nature has made speech the condition and vehicle of social intercourse, and consequently it is essentially so elementary a discipline, that a thorough knowl-

edge of the mother tongue seems to be presupposed as the basis of all education, and especially as an indispensable preparation for the reception of academic instruction. It is, doubtless, for this reason, that the study of the English language has usually been almost wholly excluded from the collegial curriculum, and recently, indeed, from humbler seminaries in our American system of education, and, therefore, so great a novelty as its abrupt transfer from the nursery to the auditorium of a post-graduate course may seem to demand both explanation and apology.

It is a trite remark, that the national history and the national language begin to be studied only in their decay, and scholars have sometimes shown an almost superstitious reluctance to approach either, lest they should contribute to the aggravation of a symptom, whose manifestation might tend to hasten the catastrophe of which it is the forerunner. Indeed, if we listen to some of the voices around us, we are in danger of being persuaded that the decline of our own tongue has not only commenced, but has already advanced too far to be averted or even arrested. If it is true, as is intimated by the author of our most widely-circulated dictionary —a dictionary which itself does not explain the vocabulary of Paradise Lost—that it is a violation

of the present standard of good taste to employ old English words not used by Dryden, Pope, Gray, Goldsmith and Cowper; if words which enter into the phraseology of Spenser, and Shakspeare, and Milton, though important "to the antiquary, are useless to the great mass of readers;" and, above all, if the dialect of the authoritative standard of the Christian faith, in the purest, simplest, and most beautiful form in which it has been presented to modern intelligence, is obsolete, unintelligible, forgotten, then, indeed, the English language is decayed, extinct, fossilized, and, like other organic relics of the past, a fit subject for curious antiquarian research and philosophic investigation, but no longer a theme of living, breathing interest.

In reasoning from the past to the present, we are apt to forget that Protestant Christianity and the invention of printing have entirely changed the outward conditions of at least Gothic, not to say civilized, humanity, and so distinguished this new phase of Indo-European life from that old world which lies behind us, that, though all which was true of individual man, in the days of Plato, and of Seneca, and of Abelard, is true now, yet most which was conceived to be true of man as a created and dependent, or as a social being, is at this day recognized as either false or abnormal. The reciprocal relations between

the means and the ends of human life are reversed, and the conscious, deliberate aims and voluntary processes and instrumentalities of intellectual action are completely revolutionized. Hence, we are constantly in danger of error, when, in the economy of social man, we apply ancient theories to modern facts, and deduce present effects or predict future consequences from causes which, in remote ages, have produced results analogous to recent or expected phenomena. This is especially true with reference to those studies and those pursuits which are less immediately connected with the fleeting interests of the hour. We are, accordingly, not warranted in concluding that, because the creative spirits of ancient and flourishing Hellenic literature did not concern themselves with grammatical subtleties, but left the syntactical and orthoepical theories of the Greek language to be developed in late and degenerate Alexandria, therefore the study of native philology in commercial London and industrial Manchester proves the decadence of the heroic speech, which in former centuries embodied the epic and dramatic glories of English genius.

The impulse to the study of English, and especially of its earlier forms, which has lately begun to be felt in England and in this country, is not a result of the action of domestic causes. It has not grown out of

anything in the political or social condition of the English and American people, or out of any morbid habit of the common language and literature of both, but it had its origin wholly in the contagion of Continental example. The jealousies and alarms of the turbulent period which followed the first French Revolution, and which suspended the independent political existence of so many of the minor European States, and threatened all with ultimate absorption, naturally stimulated the self-conscious individuality of every race, and led them alike to attach special value to everything characteristic, everything peculiar, in their own constitution, their own possessions, their own historic recollections, as conservative elements, as means of resistance against an influence which sought, first, to denationalize, and then to assimilate them all to its own social and governmental system. Hence, contemporaneously with the wars of that eventful crisis, there sprang up a universal spirit of local inquiry, local pride, and local patriotism; the history, the archæology, the language, the early literature, of every European people, became objects of earnest study, first with its own scholars, then with allied nations or races, and, finally, by the power of international sympathy, and the unexpected light which etymological researches have thrown on some of the

most interesting questions belonging to present psychology and to past history, with enlightened and philosophic thinkers everywhere.

The people of England were less agitated by the fears which disturbed the repose of the Continental nations, and they are constitutionally slow in yielding either to moral, to intellectual, or to material impulses from without. Accordingly, while the philologists and historians of Denmark and of Germany were studiously investigating and elucidating the course of Anglo-Saxon history, the laws of the Anglo-Saxon language, and the character of its literature, as things cognate with their own past glories and future aspirations, few native English inquirers busied themselves with studies, whose obscure, though real, connection with the stirring events of that epoch no timid sensitiveness had yet taught the British mind to feel.

But although the interest now manifested in the history and true linguistic character of the English speech originated in external movements, yet it must be admitted that it is, at this moment, strengthened in England by a feeling of apprehension concerning the position of that country in coming years—an apprehension which, in spite of occasional manifestations of hereditary confidence and pride, is a very widely-prevalent sentiment among the British peo-

ple. Recent occurrences have inspired an anxiety amounting almost to alarm, in reference to their relations with their nearest, as well as their more remote, Continental neighbors, and those, who know that twice in the seventeenth century England was fast drifting towards a vassalage to France, may well be pardoned for some misgivings with regard to the present tendencies of the British social and political state. In such circumstances, it is natural that enlightened Englishmen should cherish a livelier attachment to all that is great and reverend in the memories of their early being, and thought, and action, and should regard with increasing interest the records that recount the series of intellectual and physical triumphs by which the Anglo-Saxon and the Norman raised the Empire they successively conquered to such an unexampled pitch of splendor and of power.

Modern philology, then, did not, like ancient grammatical lore, originate in the life-and-death struggle of perishing nationalities, nor in a morbid consciousness of internal decay and approaching dissolution, but in a sound, philosophic appreciation of the surest safeguard of national independence and national honor—an intelligent comprehension, namely, of what is good and what is great in national history, national institutions, national character. It is a pul-

sation of life, not a throe of death; a token of regeneration, not a sign of extinction. The zeal with which these studies are pursued is a high expression of intellectual patriotism, a security against the perils of absorption and centralization which are again menacing the commonwealths of the Eastern Continent, a bulwark against the dangers with which what exists of Continental liberty is threatened, now by the luxurious over-civilization which follows a wide and successful commerce, now by Muscovite barbarism, and now by pontifical obscurantism.

The fruits of increased attention to domestic philology have been strikingly manifested in the reviving literatures, and the awakening moral and political energies, of many lesser European peoples, which, until the agitations I speak of, seemed to be fast sinking into forgetfulness and inaction. States and races, long deemed insignificant and decrepit, have given a new impulse to the intellectual movement of our age, and, at the same time, are throwing up new barricades against the encroachments of the great Continental despotisms. Denmark, Norway, Sweden, Poland, Bohemia, Hungary, have roused themselves to the creation of new letters, and the manifestation of a new popular life. The Europe of to-day is protesting against being Teutonized, as energetically as did the Europe of 1800 against conformity to a Gallic

organization, and we may well hope that the same spirit will be found equally potent to resist the Panslavic invasion, which is the next source of danger to the civil and the intellectual liberties of Christendom.

There are circumstances in the inherent character of the English language which demand—there are circumstances in its position which recommend—the most sedulous and persevering investigation. I will not here speak of what belongs to another part of our course—the general value and importance of linguistic inquiry—but I will draw your attention to the multifarious etymology of our Babylonish vocabulary, and the composite structrue of our syntax, as peculiarities of the English tongue not shared in an equal degree by any other European speech known in literature, and which require an amount of systematic study not in other cases usually necessary. The ground-work of English, indeed, can be, and best is, learned at the domestic fireside—a school for which there is no adequate substitute; but the knowledge there acquired is not, as in homogeneous languages, a root, out of which will spontaneously grow the flowers and the fruits which adorn and enrich the speech of man. English has been so much affected by extraneous, alien, and discordant influences, so much mixed with foreign ingredients, so much over-

loaded with adventitious appendages, that it is, to most of those who speak it, in a considerable degree, a conventional and arbitrary symbolism. The Anglo-Saxon tongue has a craving appetite, and is as rapacious of words, and as tolerant of forms, as are its children of territory and of religions. But, in spite of its power of assimilation, there is much of the speech of England which has never become connatural to the Anglican people, and it has passively suffered the introduction of many syntactical combinations, which are not merely irregular, but repugnant. It has lost its original organic law of progress, and its present growth is by accretion, not by development. I shall not here inquire whether this condition of English is an evil. There are many cases where a complex and cunningly-devised machine, dexterously guided, can do that which the congenital hand fails to accomplish; but the computing of our losses and gains, the striking of our linguistic balance, belongs elsewhere. Suffice it say, that English is not a language which teaches itself by mere unreflecting usage. It can only be mastered, in all its wealth, in all its power, by conscious, persistent labor; and, therefore, when all the world is awaking to the value of general philological science, it would ill become us to be slow in recognizing the special importance of the study of our own tongue.

But, in order that this study may commend itself to the popular mind, its value and its interest must first be made apparent to the thinking spirits by whom the current of public opinion is determined. Knowledge has its sources on the heights of humanity, and culture derives its authority from the example of the acknowledged leaders of society. Studies which are neglected or undervalued by the educated man, will have still less attraction for the pupil and his teacher, and English philology cannot win its way to a form in American high-schools, until it shall have been recognized as a worthy pursuit by the learned and the wise, who are no longer subject to the authority of academic teachers.

But, great as is the practical importance of the knowledge of words, let it not be said that, for its sake alone, we encourage inquiry into the structure and constitution of our national speech. The discipline we advocate embraces a broader range, and extends itself to the scientific notion of philology, which, though familiar in German literature, has not yet become the recognized meaning of the word in English. The course we propose includes, naturally and necessarily, the study of those old English writers, in whose works we find, not only the most forcible forms of expression, but a marvelous affluence of the mighty thoughts, out of which has grown

the action that has made England and her children the wonder and the envy of the world. Indeed, with respect to the technicalities of grammar and etymology, the radical forms of structure which characterize our ancient tongue, the American student has but narrow means of original research. His investigations must, for the present, be pursued at second-hand, by the aid of materials inadequate in themselves, and, too often, collected with little judgment or discrimination. The standard of linguistic science in England is comparatively low. British scholars have produced few satisfactory discussions of Anglo-Saxon or Old English inflectional or structural forms, and it is to Teutonic zeal and talent that we must still look for the elucidation of most points of interest connected with either the form or the signification of primitive English. A large proportion of the relics of Anglo-Saxon and of early English literature remains still unpublished, or has been edited with so little sound learning and critical ability as to serve less to guide than to lead astray. Hence, in the determination of ancient texts, we must often accept hasty conjecture, or crude opinion, in place of established fact. But a better era has commenced. Englishmen are learning, from Continental linguists, to do what native scholarship and industry had hitherto proved unable to accomplish;

and we may hope that, at no distant day, the yet hidden treasures of British philology will all be made accessible, and permanently secured for future study, by means of the art which has been styled

ARS OMNIUM ARTIUM CONSERVATRIX.

The general inferiority of English and French to Scandinavian and Teutonic scholars, in philological and especially etymological research, is a remarkable, but an indisputable fact, and its explanation is not obvious. I can by no means ascribe the difference to an inherent inaptitude on our part for such subtle investigations, to a native insensibility to the delicate relations between allied sounds and allied significations; but I believe the cause to lie much in the different intellectual habits which are formed in early life, by the use of the respective languages of those nations. The German is remarkably homogeneous in its character. An immense proportion of its vocabulary consists either of simple primitives, or of words obviously compounded or derived from radicals, which still exist in current use as independent vocables. Its grammatical structure is of great regularity, and there are few tongues where the conformity to general rules is so universal, and where isolated, unrelated philological facts are so rare. At the same time, there is enough of grammatical inflection to familiarize the native speaker with syntac-

tical principles imperfectly exemplified in French and English, and a sufficiently complex arrangement of the period to call into constant exercise the logical faculties required for the comprehension of the rules of universal grammar. While, therefore, I by no means maintain that German has any superiority over English for the purposes of poetry, of miscellaneous literature, the intercourse of society, or the ordinary cares and duties of life, yet as, in itself, an intellectual, and especially a linguistic discipline, it has great advantages over any of the tongues which embody the general literature of modern Europe. The German boy comes out of the nursery scarcely a worse grammarian, and a far better etymologist, than the ancient Roman, and is already imbued with a philological culture which the Englishman can only acquire by years of painful study. Hence, we account readily for the comparative excellence of German dictionaries and other helps to the full knowledge of the language, while in English, having no grammar—we have till lately possessed no grammars, and we still want a dictionary. In both English and French, the etymology is foreign, or obscured by great changes of form, the syntax is arbitrary and conventional (so far as those terms can be applied to anything in language), the inflections are bald and imperfectly

distinguished, and the number of solitary exceptional facts, especially in French, is very great. When I speak of the poverty of French inflections, I am aware I contradict the accidence, which shows a very full system of varied terminations, but the native language is learned by the ear, and the spoken tongue of France reduces its multitude of written endings to a very small list of articulated ones. The signs of number and of person, and often of tense and gender, to which the inflections are restricted, though well marked in written French, disappear almost wholly in pronunciation, and for those who only speak, they are non-existent.* While, therefore, for speaking French by rote, as natives do all tongues, no grammar is needed, yet few written dialects require grammatical aid more imperiously; while, at the same time, the grammar is of so special a character as to teach little of general linguistic principle.

The German philologist, then, begins where the Englishman and the Frenchman leave off—or, rather, at a point to which the great mass of French and English literary men never attain; and, with such an advantage in the starting ground, it would be strange if he did not surpass his rivals.

* Aimais, aimait, aimaient are identical in sound; and aimer, aimez, aimai, aimé, aimés, and aimées differ so little from the former group, that ignorant persons often confound them all in writing, as well as in speaking.

The American student shares with the Englishman and the Frenchman in the defect of early grammatical discipline, and, possessing few large libraries, no collections of rare early editions, no repositories of original manuscripts, he labors under the further inconvenience of a want of access to the primitive sources of etymological instruction. For the present, therefore, he must renounce the ambition of adding anything to the existing stores of knowledge respecting English philology, and content himself with the humbler and more selfish aim of appropriating and elaborating the material which more fortunate or better-trained European scholars have gathered or discovered. We must, in the main, study English with reference to practical use, rather than to philosophic principle; aim at the concrete, rather than the absolute and the abstract. And this falls in with what is eminently, I will not say happily, the present tendency of the American mind. We demand, in all things, an appreciable, tangible result, and if a particular knowledge cannot be shown to have a *value*, it is to little purpose to recommend its cultivation because of its *worth*. We must all, then, men of action and men of thought, alike, study English in much the same way, and by the aid of the same instrumentalities—the practical man, because he aims at a practical end;

the philosophic thinker, because he is destitute of the means of approximating to *his* end by any higher method than the imperfect course which alone is open to the American scholar.

There are circumstances which recommend the study of English specially to us Americans, others which appeal equally to all who use the Anglican speech. Of the former, most prominent is the fact that we, in general, require a more comprehensive knowledge of our own tongue than any other people. Except in mere mechanical matters, and even there far more imperfectly, we have adopted the principle of the division of labor to a more limited extent than any modern civilized nation. Every man is a dabbler, if not a master, in every knowledge. Every man is a divine, a statesman, a physician, and a lawyer to himself, as well as a counsellor to his neighbors, on all the interests involved in the sciences appropriately belonging to those professions. We all read books, magazines, newspapers, all attend learned lectures, and too many of us, indeed, write the one, or deliver the other. We resemble the Margites of Homer, who Πόλλ' ἠπίστατο ἔργα, practiced every art, and if, as he κακῶς δ' ἠπίστατο πάντα, bungled in all, we, too, must fall short of universal perfection, we still need, with our multifarious strivings, an encyclopedic training, a wide command over the resources of

our native tongue, and, more or less, a knowledge of all its special nomenclatures. But this very fact of the general use of the whole English vocabulary among us is a dangerous cause of corruption of speech, against which the careful study of our language is an important antidote. Things much used inevitably become much worn, and it is one of the most curious phenomena of language, that words are as subject as coin to defacement and abrasion, by brisk circulation. The majority of those who speak any tongue incline to speak it imperfectly, and where all use the dialect of books, the vehicle of the profoundest thoughts, the loftiest images, the most sacred emotions, that the intellect, the fancy, the heart of man has conceived, there special precautions are necessary, to prevent that medium from becoming debased and vulgarized by corruptions of form, or, at least, by association with depraved beings and unworthy themes. While, therefore, I would open to the humble and the unschooled the freest access to all the rich treasures which English literature embodies, I would inculcate the importance of a careful study of genuine English, and a conscientious scrupulosity in its accurate use, upon all who in any manner occupy the position of teachers or leaders of the American mind, all whose habits, whose tastes, or whose vocations, lead them to speak oftener than to hear.

But, as I observed, there are considerations, common to the Englishman and the American, which powerfully recommend the study of our language to thinking men. One of the most important of these is a repetition of the argument I have just used, but in a more extended application. I allude to what, for want of any other equally appropriate epithet, I must characterize by a designation much abused both by those who rally under it as a watch-word of party, and by those to whom it is a token of offense—I mean the *conservatism* of such studies. It is doubted, by the ablest judges, whether, except in the introduction of new names for new things, English has made any solid improvement for two centuries and a half, and few are sanguine enough to believe that future changes in its structure, or in its vocabulary, unless in the way just stated, will be changes for the better. It is obvious, too, that, in proportion as new grammatical forms, and new designations for familiar things and thoughts, are introduced, older ones must grow obsolete, and, of course, the existing, and, especially, the earlier literature of England, will become gradually less intelligible. The importance of a permanent literature, of authoritative standards of expression, and, especially, of those great, lasting works of the imagination, which, in all highly-cultivated nations, constitute the "*vol-*

umes paramount" of their literature, has been too generally appreciated to require here argument or illus tration. Suffice it to say, they are among the most potent agencies in the cultivation of the national mind and heart, the strongest bond of union in a homogeneous people, the surest holding ground against the shifting currents, the ebb and flow of opinion and of taste.

Now, the Anglo-Saxon race is fortunate in possessing more such volumes paramount than any other modern people. The Greeks had their moral and sententious Hesiod; their great tragic trio; their comic Aristophanes and Menander; they had Herodotus, and Thucydides, and Plato, and Xenophon; and, above all, their epic Homer, whose story and whose speech were more closely interwoven with the very soul of the whole Hellenic people than was ever other secular composition with the life of man; the Romans had Ennius, and Terence, and Plautus, and, at last, but only when all was lost, Horace, and Virgil, and Cicero; the Italians have Dante, and Petrarch, and Tasso, and Ariosto; the Icelanders have Laxdæla, the story of Njáll, and the Chronicles of Snorro; and we, more favored than all, have Chaucer, and Spenser, and Bacon, and Milton, and Shakspeare—each, in his own field, as great as the mightiest that ever wielded the pen in the like kind; and, beyond all

these, we have the oracles of our faith, stamped with the self-approving impress of certain verity, and rendered, by English pens, in a form of rarer beauty than has elsewhere clothed the words of God in the speech of man.

Now, all these books have been for centuries a daily food, an intellectual pabulum, that actually has entered into and moulded the living thought and action of gifted nations; and, in the case of the Anglican people, it will not be disputed that, working, as they have, all in one direction, their great authors have been more powerful than any other influence in first making, and then keeping, the Englishman and the American what they are, what for hundreds of years they have been, what, God willing, for thousands they shall be, the pioneer race in the march of man towards the highest summits of worthy human achievement. The path of national literature is that of those comets which long approach the central orb, and long recede, but never return to the perihelion, and the language of a people has ordinarily but one period of culmination. When genius has evolved the best thoughts of a given state of society, and elaborated the choicest forms of expression of which a given speech is capable, it has anticipated and appropriated the greatest results of that condition of human life, and subsequent litera

ture is but reproductive, not creative in its character, until some mighty, and, for the time, destructive revolution, has dissolved and re-amalgamated the elements of language and of social life in new and diverse combinations.

That the English tongue, and the men who speak it, will yet achieve great victories in the field of mind, great works in the world of sense, we have ample self-conscious assurance; but, in the existing state of society, it is vain to expect that any future literary productions can occupy the place, or exert the deep-pervading influence, of the volumes I have named. To them, therefore, and to the dialect which is their vehicle, the instinct of self-preservation impels us tenaciously to cling, and when, through our appetite for novelty, our incurious neglect of the beautiful and the great, these volumes cease to be authorities in language, standards of moral truth and æsthetical beauty, and inspiriters of thought and of action, we shall have lost the springs of national greatness, which it most concerned us to preserve.

We hear much, in political life, of recurrence to first principles, and startling novelties not unfrequently win their way to popular acceptance under that disguise. With equal truth, and greater sincerity, we may say that, in language and in literature, nothing can save us from ceaseless revolution but a

frequent recourse to the primitive authorities and the recognized canons of highest perfection.

In commencing the study of early English, young persons are not unfrequently repelled by differences of form, which seem to demand a considerable amount of labor to master. Unhappily, English scholars, themselves often better instructed in other tongues than in their own, have very frequently sanctioned the mistake, and encouraged the indolence of cotemporary readers, by editing modernized editions of good old authors, and, in thus clothing them anew, so changed their outward aspect, and often their essential character, that the parents would scarcely be able to recognize their own progeny. The British press has teemed with disgracefully-mutilated and disguised editions, while scrupulously faithful reprints of early English works have, until lately, not been often attempted, or ever well encouraged. As a general rule, in the republication of works which genius and time have sealed with the stamp of authority, no change whatever, except the correction of obvious typographical errors, should be tolerated, and even these should be ventured on only with extreme caution, because it often turns out that what is hastily assumed to have been a misprint, is, in fact, a form deliberately adopted by a writer, better able to judge what was the true orthography for the time, than any later scholar can be.

The rule of Coleridge has nowhere a juster application than here: That, when we meet an apparent error in a good author, we are to presume ourselves "ignorant of his understanding, until we are certain that we understand his ignorance." The number of scholars who are so thoroughly possessed of the English of the sixteenth, not to mention earlier centuries, as to be safely entrusted with the correction of authors of that period, is exceedingly small, and I doubt whether it would be possible to cite a single instance where this has been attempted, without grievous error, while, in most cases, the book has been not merely lessened in value, but rendered worse than useless for all the purposes of philology and true literature.*

*I will, at the risk of the imputation of hypercriticism, illustrate by a single instance: The recently-discovered manuscript of the Earl of Devonshire's translation of Paleario's Treatise on the Benefits of Christ's Death is evidently a copy, made by an ignorant transcriber, and its orthography is extremely incorrect and variable. In preparing it for the press, it was, unfortunately, deemed expedient to reform the spelling, for the sake of making it more uniform and intelligible, as well as correct, and the task has been executed with great care, and in as good faith as the erroneous principle adopted would admit of. As a frontispiece, a fac-simile of one of the very small pages of the manuscript is given, containing eighteen lines, or about one hundred and twenty-five words. In printing the text, the editor has omitted a comma in the seventh line, and thereby changed, or, at least, obscured, the meaning of a very important and very clear passage, which contained the marrow of the whole treatise. Of course, such a departure from the letter in a weighty period destroys the confidence of critical readers in the edition, and the book, in a grammatical point of view, becomes worthless. The manuscript in question is one of the most important recent acquisitions to the theology of the Reformation and the early literature of England, and the voluntary admission of any changes in its text shows a want of exact scholarship in a quarter where we had the best right to expect it.

But for the unfortunate readiness with which editors and publishers have yielded to the popular demand for conformity to the spelling and the vocabulary of the day, the knowledge of genuine English would now be both more general and further advanced than it is. The habit of reading books as they were written would have kept up the comprehension, if not the use, of good old forms and choice words, which have irrecoverably perished, and the English of the most vigorous period of our literature would not now be sneered at as obsolete and unintelligible.

After all, the difficulties of acquiring a familiar acquaintance with the dialect of the reign of Edward III. are extremely small. Let not the student be discouraged by an imperfect and irregular orthography, or, now and then, a forgotten word, and a month's study will enable him to read, with entire readiness and pleasure, all that the genius of England has produced during the five centuries that have elapsed since English literature can be said to have had a being.

I cannot, of course, here dilate upon the value of a familiarity with the earlier English writers, but I may, perhaps, be indulged in a momentary reference to the greatest of them, the perusal of whose works alone would much more than compensate the little

labor required to understand the dialect in which they are written. Neither the prose nor the verse of the English literature of the fourteenth century comes up to the elaborate elegance and the classic finish of Boccaccio and of Petrarch. But, in original power and in all the highest qualities of poetry, no continental writer of that period, with the single exception of Dante, can, for a moment, be compared with Chaucer, who, only less than Shakspeare, deserves the epithet, myriad-minded, so happily applied by Coleridge to the great dramatist. He is eminently the creator of our literary dialect, the inventor, or, at least, the introducer, of our finest poetical forms, and so essential were his labors in the founding of our national literature, that, without Chaucer, the seventeenth century could have produced no Milton, the nineteenth no Keats. It is through ignorance alone, that his diction and his versification have been condemned as rude and unpolished; and, though there are some difficulties in his prosody, which have not yet been fully solved, the general flow of his verse is scarcely inferior to the melody of Spenser. There can be little doubt that his metrical system was in perfect accordance with the orthoepy of his age, and it was full two centuries before any improvements were made upon his diction or his numbers.

I said, in the outset, that there were circumstances in the position and the external relations of the English language which recommended its earnest study and cultivation. I refer, of course, to the commanding political influence, the wide-spread territory, and the commercial importance of the two great mother-countries whose vernacular it is. Although England is no longer at the head of the European political system—a position which she justly forfeited when she permitted her statesmen to sacrifice the cause of popular liberty upon the European continent—yet, in spite of the errors of her rulers, she is still the leading influence in the sphere of commerce, of industry, of progressive civilization, and of enlightened Christian philanthropy.

The British capital is at the geographical centre of the terrestrious portion of the globe, and while other great cities represent individual nationalities, or restricted and temporary aims, the lasting, cardinal interests of universal humanity have their brightest point of radiation in the city of London. The language of England is spoken by greater numbers than any other Christian speech, and it is the vehicle of a wider, purer, more beneficent moral action than any other existing tongue. Its prevalence is everywhere marked by social order, by civil and religious liberty, by general intelligence and

progressive knowledge, by enlightened and comprehensive charity; and it is remarkable that, while some younger languages and younger races are decaying and gradually disappearing from their natal soil, the English speech and the descendants of those who first employed it, are making hourly conquests of new territory, and have already established their posts within hailing distance throughout the circuit of the habitable globe. The English language is the special organ of all the great, world-wide charities which so honorably distinguish the present from all preceding ages. With little of the speculative universal philanthropy which has been so loudly preached and so little practiced elsewhere, the English people have been foremost in every scheme of active benevolence, and they have been worthily seconded by their American brethren. The English Bible has been scattered by hundreds of millions over the face of the earth, and English-speaking missionaries have planted their maternal speech at scores of important points, to which, had not their courageous and self-devoting energy paved the way, not even the enterprise of trade could have opened a path. Hence, English is emphatically the language of commerce, of civilization, of social and religious freedom, of progressive intelligence, and of active catholic philanthropy; and, therefore, beyond

any tongue ever used by man, it is of right the cosmopolite speech.

That it will ever become, as some dream, literally universal in its empire, I am, indeed, far from believing; nor do I suppose that the period will ever arrive, when our many-sided humanity will content itself with a single tongue. In the incessant change which all language necessarily undergoes, English itself will have ceased to exist, in a form identifiable with its present character, long before even the half of the human family can be so far harmonized and assimilated as to employ one common medium of intercourse. Languages adhere so tenaciously to their native soil, that, in general, they can be eradicated only by the extirpation of the races that speak them. To take a striking instance: the Celtic has less vitality, less power of resistance, than any other speech accessible to philological research. In its whole known history it has made no conquests, and it has been ever in a waning condition, and yet, comparatively feeble as is its self-sustaining power, two thousand years of Roman and Teutonic triumphs have not stifled its accents in England or in Gaul. It has died only with its dying race, and centuries may yet elapse before English shall be the sole speech of Britain itself.

In like manner, not to speak of other sporadic

ancient dialects, the primitive language of Spain, after a struggle of two and twenty centuries with Phœnicians, and Celts, and Carthagenians, and Greeks, and Romans, and Goths, and Arabs, is still the daily speech of half a million of people. If, then, such be the persistence of language, how can we look forward to a period when English shall have vanquished and superseded the Chinese and the Tartar dialects, the many tongues of polyglot India, the yet-surviving Semitic speeches, in their wide diffusion, and the numerous and powerful Indo-European languages, which are even now disputing with it the mastery? In short, the prospect of the final triumph of any one tongue is as distant, as improbable, I may add, as undesirable, as the subjection of universal man to one monarchy, or the conformity of his multitudinous races to one standard of color, one physical type. The Author of our being has implanted in us our discrepant tendencies, for wise purposes, and they are, indeed, a part of the law of life itself. Diversity of growth is a condition of organic existence, and so long as man possesses powers of spontaneous development and action, so long as he is more and better than a machine, so long he will continue to manifest outward and inward differences, unlikeness of form, antagonism of opinion, and varieties of speech. But yet, though English will not supersede, still less extirpate,

the thousand languages now spoken, it is not unreasonable to expect for it a wider diffusion, a more commanding influence, a more universally-acknowledged beneficent action, than has yet been reached, or can hereafter be acquired, by any ancient or now-existent tongue, and we may hope that the great names which adorn it will enjoy a wider and more durable renown than any others of the sons of man.

These brief remarks do but hint the importance of the studies I am advocating, and it will be the leading object of my future discourses more fully to expound their claims, and to point out the best method of pursuing them.

A series of lessons upon the technicalities of English philology would, it is thought, be premature, and, moreover, adequate time and means for the execution of an undertaking, involving so vast an amount of toil, have not yet been given. That must be the work, if not of another laborer, at least, of other years, and our present readings must be regarded only as a collection of observations upon the principles of articulate language, as exemplified in the phonology, vocabulary, and syntax of English; or, in other words, as a course *preparatory* to a course of lectures on the English tongue. Such as I describe the course, too, I shall endeavor to make each individual lecture, namely, a somewhat informal

presentation of some one or more philological laws, or general facts, in their connection with the essential character, or historical fortunes, of our own speech.

I will not dilate on the difficulties attending the preparation of so extensive a course, in a few weeks of often-interrupted labor, without access to large, or specially-selected, libraries, and, in fact, almost wholly without appropriate aids and appliances—difficulties which, duly weighed, would rather provoke your censure of the speaker for undertaking a task so much beyond his forces and his means, than conciliate your indulgence for his imperfect execution of it; but, I must be pardoned for acknowledging what it will be no exaggeration to call my perplexity, in determining upon the extent to which the course ought to assume a scientific or a popular form. The lectures are, under the circumstances, essentially experimental, the character and tastes of the small audiences, I was encouraged to expect, uncertain; but the necessities of the case have decided the question for me, and, as in many other instances, where external conditions control our action, in a way which my own judgment would probably have approved.

The preparation of a series of thoroughly-scientific discourses upon the English tongue, within the time